No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1948

FRANK HEWES, REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, PETITIONER

v.

GRIMES PACKING CO., KADIAK FISHERMEN COMPANY, LIBBY, MCNEILL & LIBBY, PEGGY MCCOLLOUGH & CO., INC., PARKER CANNING CO., INC., SAN JUAN FISHING & PACKING CO., AND CHARLES ROSENBERG, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 24

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, PETITIONER

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, MCNEILL & LIBBY, FRANK MCCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., AND UGANIK FISHERIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (R. 42-61) is reported at 67 F. Supp. 43. The opinion of the court of appeals (R. 499-514) is reported at 165 F. 2d 323.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1947 (R. 515). The petition for a writ of certiorari was filed on February

20, 1948, and was granted on April 5, 1948 (R. 517). The jurisdiction of this Court rests on section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U. S. C. 1254).

QUESTIONS PRESENTED

1. Whether the Act of May 1, 1936, authorizing the Secretary of the Interior to set aside "any area of land" or "public lands" in Alaska as Indian reservations, empowered him to include an area of tidelands and adjacent coastal waters in order that the natives might be secure in their fisheries and, if so, whether the White Act of June 6, 1924, which prohibits the Secretary of the Interior from granting exclusive rights of fishery in the waters of Alaska, forbids him from including an area of tidelands and coastal waters in an Indian reservation.

2. Whether the Secretary of the Interior is an indispensable party to a suit seeking to enjoin enforcement of regulations made by him relating to Alaska fisheries and an Indian reservation, when the sole defendant to the suit is the Regional Director of the Fish and Wildlife Service of the Department of the Interior.

3. Whether the jurisdiction of a court of equity may properly be invoked by the respondents to determine whether the sanctions of the White Act may be applied as a consequence of the respondents' trespass on the property in question.

4. Whether the penal provisions of the White Act may be used to prevent unauthorized activities violating White Act provisions in an area set aside as an Indian reservation.

STATUTES INVOLVED

Section 2 of the Act of May 1, 1936, 49 Stat. 1250, 48 U. S. C. 358a provides:

> the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided,* That the designation by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: * * *

Section 1 of the Act of June 6, 1924, 43 Stat. 464, as amended, 48 U. S. C. 221-222, commonly known as the White Act, provides in part:

for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the

United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.[1]

STATEMENT

This action was instituted by the respondents on June 25, 1946, to enjoin the enforcement of a fishing regulation issued by the Secretary of the Interior with respect to certain tidelands and waters at the mouth of the Karluk River on Kodiak Island off the southern coast of Alaska, and to have declared invalid a Public Land Order issued by the Secretary which included those tidelands and waters in a reservation for the Karluk Indians (R. 2-18). The only person named as defendant was petitioner Frank Hynes, the Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Department of the Interior.

The Karluk River, which empties into Shelikof Strait, is subject annually to large runs of salmon. These salmon, returning from the sea, make their way to the headwaters of the river to spawn and die. On the west bank of the river, at its mouth, is located the Indian village of Karluk. The Karluk natives are Aleuts who have from time immemorial derived their livelihood from fishing,

[1] The Secretary of the Interior succeeded the Secretary of Commerce in matters of fish control under the President's Reorganization Plan No. II of May 9, 1939, 53 Stat. 1431, submitted to Congress under the Reorganization Act of April 3, 1939, 53 Stat. 561, and made effective July 1, 1939, by Joint Resolution of June 7, 1939, 53 Stat. 813.

principally from these salmon runs. Their customary method of catching the salmon is by a net, known as a beach seine, one end of which is attached to the shore, the other being drawn by boats to deeper water at a considerable distance from the shore.

Several large commercial fishing and packing companies have located canneries on Kodiak Island some distance from Karluk. These companies send boats, some company, and others independently, owned (See, e.g., R. 176-177, 252-253), into the Karluk area as well as to other fishing grounds on Shelikof Strait to catch salmon by purse seines from the boats (R. 24-29). Among these companies are the respondents in this case, most of whom had commenced fishing in the Karluk area in 1938 or thereabouts (R. 142, 185, 216, 239, 256); purse seining had been forbidden at the river's mouth for many years prior to the middle thirties because of the conflicting interests of the two types of fishing (R. 216, 293, see *infra* note 23, pp. 54-55).

On May 22, 1943, the Secretary of the Interior issued Public Land Order No. 128, 8 F.R. 8557, wherein he set aside certain fast land on both sides of the mouth of the Karluk River, including Karluk Village "and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide * * * as an Indian reservation for the use and benefit of the native inhabitants of the Village of Karluk, Alaska, and vicinity." This order was

ratified by vote of the Indians, as required by the Act of May 1, 1936 (R. 462).

Commercial fishermen were informed of the establishment of the reservation and were advised that they could continue to operate in all reservation waters except for a restricted area at the mouth of Karluk River, which was reserved for native beach seiners (R. 126, 462-463). Markers were set out indicating the boundaries of this restricted area by the Karluk natives and officers of the Bureau of Indian Affairs (R. 124-127). However, commercial fishing continued in the restricted area in 1944 and 1945, respondents having instructed their fishermen to ignore the markers (R. 127).

Subsequently, on March 22, 1946, the Secretary of the Interior issued Alaska Fisheries Regulation 208.23 (r), Title 50, C.F.R., 11 F.R. 3105 (R. 32-33). This regulation set apart the same waters as were included within the reservation created earlier by Public Land Order No. 128 as a reserved fishing area. With respect to these waters, the regulation first set forth a general prohibition against commercial fishing pursuant to the provisions of the White Act which provides, *inter alia*, for fine or imprisonment of violators of the regulations and forfeiture of gear used in the violation. The second paragraph of the regulation waived the general prohibition in the case of fishing by the

> tion was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

After investigating the circumstances, this Court concluded that "the body of lands known as Annette Islands" reserved for the Metlakahtla Indians was not limited to dry land but also included adjacent submerged land. See also *Moore* v. *United States*, 157 F. 2d 760 (C.C.A. 9), certiorari denied, 330 U. S. 827 (submerged lands included in "tracts of land" set aside for use of Quillayute Indians). The Act of May 1, 1936, here in question, see *supra*, p. 14, is generally applicable to all Indians in Alaska. No proof is necessary to establish the fact that most of these Indians are primarily dependent upon fishing for their livelihood. Congress has repeatedly recognized that fact by exempting the Indians from the operation of acts restricting fishing. Act of June 14, 1906, 34 Stat. 263; Act of June 6, 1924, Secs. 4 and 5, 43 Stat. 464, 466, 48 U.S.C. 232, 234; Act of April 16, 1934, 48 Stat. 594, 48 U.S.C. 233. And the courts have acknowledged this Congressional understanding of the native economy. For example, in *Heckman* v. *Sutter*, 119 Fed. 83, 88 (C.C.A. 9), it was stated: "The fact that at that time the Indians and other occupants of the country largely made their living by fishing was no doubt well known

Karluk natives and their permittees,[2] reference being made to the 1936 Act.

On June 25, 1946, the appellees filed their complaint for injunctive relief against the enforcement of Fisheries Regulation 208.23 (r) and for a declaration that Public Land Order No. 128, creating the Karluk Reservation, is invalid insofar as it includes tidelands and ocean waters (R. 14). An *ex parte* restraining order was granted on June 26, 1946 (R. 37). On July 18, 1946, a hearing was held, following which the district court, on July 18, 1946, filed a written opinion and granted a preliminary injunction (R. 37, 42). Referring to the dictionary definition of "land" the court concluded that the Act of May 1, 1936, did not authorize the Secretary of the Interior to include tidelands or other lands under water within an Indian reservation (R. 45-57). It further held that the fishery regulation of 1946 was "contrary to the common and statutory law, and therefore is invalid" (R. 58-59). Finally, the court ruled that neither the United States nor the Secretary of the Interior was an indispensable party to this suit (R. 59-60).

Thereafter, trial was had on October 28, 1946, the evidence relating for the most part to the facts

---

[2] This regulation was amended on August 27, 1946, 11 F.R. 9528, by adding, "Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative."

to the legislative branch of the government * * * ."

The Karluk Indians, like other natives of Kodiak and the Aleutian chain of islands, are traditionally fishermen living almost exclusively on the returns from that vocation (R. 227, 233, 348-349, 358).[5] For generations the Karluk Indians have fished in the mouth of the Karluk River, and along the two miles of beach in front of their village. *Report on the Salmon and Salmon Rivers of Alaska*, H. R. Misc. Doc. No. 211, Vol. 18, 51st Cong., 1st Sess., pp. 2, 13-20; *Report on the Population, Industries, and Resources of Alaska*, H. R. Misc. Doc. No. 42, pt. 8, Vol. 13, 47th Cong., 2d Sess., pp. 13, 71. More than a century ago it was recorded that in one season at Karluk, 300,000 red salmon were prepared as "Yukola" (i.e., dried without salting or smoking). *Statistical Review of the Alaska Salmon Fisheries*, Rich and Ball, Bulletin of U. S. Bureau of Fisheries, Vol. XLVI, Document No. 1102, p. 664. Nor were these fishing activities of the Karluks limited to taking fish exclusively for their own consumption. They were commercial fishermen.

[5] The trial court excluded additional evidence offered by petitioner to show that the natives of Karluk depend on fishing and that the upland was of very little value to them (R. 349-350, 366). Cf. *Alaska-Pacific Fisheries* v. *United States*, 248 U. S. 78, 88-89: "While bearing a fair supply of timber, only a small portion of the upland is arable, more than three-fourths consisting of mountains and rocks. * * * The Indians could not sustain themselves from the use of the upland alone."

concerning the investment in, and the size of, the canneries and the fishing business of the respondents and injuries which they claimed would follow from enforcement of the regulations. These facts were summarized by the court in its findings (R. 24-29). While the findings do not so state, it also appeared that the fishermen had obtained permits from the natives permitting them to fish in the reservation waters so long as they did not interfere with native beach seining (R. 128). Conclusions of law in accordance with the court's earlier opinion were entered (R. 39) and, on November 6, 1946, a permanent injunction was filed (R. 40-42).

The court of appeals affirmed. It concluded that the 1936 Act did not authorize the inclusion in an Indian reservation of lands below low-water mark; that the regulation was therefore not valid under the White Act; and that the Secretary of the Interior was not an indispensable party to the suit. (R. 499-514.)

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that the Act of May 1, 1936, does not authorize the Secretary of the Interior to include tide and submerged coastal lands as well as uplands in the Karluk Indian Reservation.

2. In holding that the Act of June 6, 1924, prohibits the Secretary of the Interior from granting

exclusive rights of fishery to the Karluk Indians in the waters included within their reservation.

3. In holding that the Secretary of the Interior was not an indispensable party to this suit.

4. In enjoining the use of the penal provisions of the Act of June 6, 1924, to prevent fishing in an area closed to fishing except by Indians.

5. In holding that Public Land Order No. 128 is invalid and granting an injunction against its enforcement.

6. In holding that Alaska Fisheries Regulation 208.23 (r) is invalid and granting an injunction against its enforcement.

7. In affirming the judgment of the district court.

SUMMARY OF ARGUMENT

I

The reservation by the Secretary of the Interior of coastal lands adjacent to Kodiak Island was sanctioned by the Act of May 1, 1936, whether authority be sought from the power to designate "any area of land" previously reserved or from the power to designate additional "public lands". The court below conceded that "any area of land" could include tide and submerged lands but mistakenly assumed that the Act required a prior formal reservation of the area rather than mere prior use by the Indians. Moreover, the phrase "public lands", when used in legislation relating

to Alaska, has the same comprehensive meaning as the word "lands" alone. This is made evident by previous legislative, judicial, and administrative usage of the phrase. The provision in the Organic Act of 1884 making inapplicable to Alaska "the general land laws of the United States" serves to distinguish the contrary interpretation put on "public lands" by such cases as *Borax Ltd. v. Los Angeles*, 296 U. S. 10. In addition, this line of cases related to disposal of property, not merely the setting aside of portions of the public domain.

This textual analysis of the Act of May 1, 1936, is confirmed by the circumstances giving rise to its enactment. Congress has been vividly apprised of the fact that the Karluk Indians, like most Alaskan natives, depend almost entirely on fishing for their livelihood. The Act of 1936 was passed to protect "the economic rights of the Alaska natives." Such protection can be afforded only by including within Indian reservations submerged coastal lands underlying fisheries, a fact which has been constantly recognized administratively.

Nothing in the White Act of June 6, 1924, stands in the way of utilization of the powers granted in the Act of 1936 to grant fishery rights to Alaskan Indians. Its ban on an exclusive right of fishery was directed not at a reservation of public property for the public purpose of protecting Indian wards but at private monopolies which had

previously been allowed to exist. When the White Act was passed, the Federal Government asserted for several native groups the right of exclusive control over waters adjacent to their settlements. There was no suggestion, when the White Act was under consideration and after its passage and administrative implementation had begun, that such Indian rights were affected by the Act. Indeed, it was the representatives of the Alaskan Indians who were instrumental in persuading Congress to pass the anti-monopoly provision; it would be anomalous now to turn it against them. In any event, to the extent of any inconsistency, the White Act of 1924 was superseded by the Act of 1936.

II

If the relief sought here is granted, it will "expend itself on the public * * * domain or interfere with the public administration." *Williams* v. *Fanning*, 332 U. S. 490, 493. The Secretary will be required to make some other provision for fish conservation and for adjustment of the rights of the natives and other interested parties. In a suit in which such consequences will follow upon a judgment for the plaintiff, the Secretary is an indispensable party. Certainly, a suit in which the validity of an Indian reservation is adjudicated should not be permitted to proceed when the only defendant is an officer having nothing whatever to do with Indian affairs.

III

As trespassers on a lawfully established Indian reservation, the respondents may not enlist the aid of a court of equity to adjudge the legality of the application of White Act remedies for such trespasses. It is not the function of a court of equity to advise wrongdoers as to what penalties may lawfully be imposed upon them in advance of their intended future trespasses.

In any event, the penal provisions of the White Act may properly be invoked in the circumstances of this case. The grant of an exclusive right of fishery to Indians and their licensees is not inconsistent with the equality provisions of the White Act. That Act, of necessity, contemplates reasonable discriminations, and the special interest of the Karluks in the area affords reasonable basis for the preferential right granted them by the Secretary. Moreover, the fishing regulation in question is justifiable as a reasonable exercise of the Secretary's discretionary power to make regulations in aid of conservation. Differentiations between residents and non-residents are found in the fishing or hunting conservation laws of every State in the Union and every Canadian province, as well as in Alaska itself. The concern of the local population with protection of its fish and game supply is obviously greater than that of outsiders who can and do strike at one source

of supply and then another, exhausting each in turn.

ARGUMENT

I

THE KARLUK INDIAN RESERVATION PROPERLY INCLUDED LANDS UNDER WATER

A. The Act of May 1, 1936, authorized the Secretary of the Interior to include coastal waters as well as uplands in the Karluk Indian Reservation.

Public Land Order No. 128, 8 F.R. 8557, by which the Secretary of the Interior set aside the Karluk Reservation, including waters adjacent to the fast land, is based on the Act of May 1, 1936, 49 Stat. 1250, 48 U.S.C. 358a. Section 2 of that Act authorizes the Secretary

> to designate as an Indian reservation *any area of land* which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional *public lands adjacent thereto,* within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided,* That the designation by the Secretary of the Interior of *any such area of land* as a reservation shall

> be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: [Emphasis supplied.]

The 1884 Act, referred to, provides "that the Indians * * * shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them * * *." The 1891 Act reserved from sale any lands "to which the natives of Alaska have prior rights by virtue of actual occupation."

The natives of Karluk met all the statutory requirements. They had occupied and used the area in question since time immemorial, and forty acres within the 1943 reservation had been reserved on March 4, 1930, by Executive Order No. 5289, for their use for a school. The Indians approved establishment of the reservation as required by the 1936 statute (R. 462). Accordingly, the sole question raised with respect to Public Land Order No. 128 is whether the phrases "any area of land" and "public lands" in the 1936 Act empower the Secretary to include waters in the reservation as well as fast land. The petitioner submits that they do.

1. *The language of the 1936 Act embraced lands under water.*—The 1936 Act authorized the Secretary of the Interior to designate as an Indian

reservation "any area of land" reserved under the 1884 Act, the 1891 Act, or by executive order, together with additional "public lands" adjacent to such area of land or "any other public lands" actually occupied by Indians. Long before the enactment of the 1936 legislation, the "lands" reserved by the 1884 Act had been held to include lands under water. *Heckman* v. *Sutter*, 119 Fed. 83, 88 (C.C.A. 9), and 128 Fed. 393, 395 (C.C.A. 9); *Sutter* v. *Heckman*, 1 Alaska 188; *Miller* v. *United States*, 159 F. 2d 997 (C.C.A. 9). The "lands" reserved by Section 15 of the 1891 Act had been held to include waters as well as uplands (*Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78), and many executive order reservations established in Alaska prior to 1936 had included underwater lands.[3] Thus at every point the "lands" which the 1936 Act authorized the Secretary of the Interior to designate as Indian reservations have been held to include tidelands and fisheries. Plainly, Congress adopted this executive and

[3] See, for example, Executive Order No. 2141, February 27, 1915 (Tyonek or Moquawkie Reserve), construed in 49 L. D. 592; Executive Order No. 6044, February 23, 1933 (Amaknak); Executive Order No. 1555, June 19, 1912 (Hydaburg); Proclamation No. 39, December 24, 1892, 27 Stat. 1052; Proclamation No. 1332, April 28, 1916, 39 Stat. 1777 (Annette Islands). The validity of the Annette Islands proclamation was upheld in *Alaska Pacific Fisheries* v. *United States*, 240 Fed. 274 (C.C.A. 9), affirmed on other grounds, 248 U. S. 78, and was recognized by Congress in the Act of May 7, 1934, c. 221, 48 Stat. 667, 8 U.S.C. 601 note. That these reservations included coastal waters is shown, in detail, *infra*, note 12, p. 40, and p. 48.

judicial construction in 1936 when it specifically referred to the earlier statutes and executive orders. *Stairs* v. *Peaslee*, 18 How. 521; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479; *Armstrong Paint & Varnish Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315.

The court below (R. 507, 508), unlike the trial court (R. 57), accepted the view that the word "land" as used in the 1936 Act includes tide or submerged lands.[4] It fell into its first error, however, when it divided the lands which might be reserved into four classes (R. 501-502) and stated that it was not contended that "these Indians had had reserved to them any of the below tide waters of Shelikof Strait by virtue of" the 1884 Act, the 1891 Act or executive order (the court's first two classes), and that hence the only possible source of authority for the Secretary would be the later language of the Act referring to "public lands" (R. 502). The court below apparently thought that the phrase "any area of land which

[4] The opinion of the circuit court of appeals refers throughout to land below low-water mark, and states (R. 499, note 1) that the injunction and present litigation are not concerned with rights between high and low water. The injunction relates to land below mean low tide (R. 41) but the complaint sought a decree that no reservation under the 1936 Act could "lawfully embrace tide lands or ocean waters" (R. 14), and the conclusions of law of the trial court stated (R. 39) that the order establishing the reservation was invalid "insofar as the same purports to cover or embrace the ocean or tidal waters below mean high tide." The theory of the court below that *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, and similar decisions are controlling, would exclude tidelands, i.e., lands below high-water mark, from the reservation.

has been reserved" was inapplicable because no formal reservation had been established.

But neither the 1884 Act nor the 1891 Act required a formal reservation of particular areas. See *supra*, p. 15. They preserved the "prior rights" of Indians in all lands used, occupied, or claimed by them. They left formal reservation of such areas "for future legislation by Congress." As the Secretary of the Interior stated in urging passage of the bill which became the 1936 Act: "Lands which should have been, by virtue of these acts, segregated for natives of Alaska have not been so segregated. The provisions of section 2 of H. R. 9866 will aid the Federal Government in rectifying this condition, and in protecting the interests of the natives in the future." H. Rep. No. 2244, 74th Cong., 2d Sess., pp. 3-5; S. Rep. No. 1748, 74th Cong., 2d Sess. pp. 3-4. The 1936 Act supplied a procedure whereby specific boundaries of those areas would be fixed. The Karluk Indians had prior rights in the area here in question by virtue of use, occupation and claim since time immemorial, but the limits thereof had never been defined. Accordingly, the phrase "any area of land" used in the first part of the 1936 Act is applicable to the land involved here.

But even if the Karluk Indians had not been occupying the beach and adjacent area since time immemorial, and authority for this reservation rested solely on the provisions of the 1936 Act

referring to "public lands," the construction given to that phrase by the court below was erroneous. The phrase "public lands," when used in legislation relating to Alaska, has the same comprehensive meaning as the word "lands" alone. The adjective "public" in the context of Alaskan legislation simply means "not private." This clearly appears from an analysis of the Act of March 3, 1891, 26 Stat. 1095. Section 12 of that Act provides that persons "now or hereafter in possession of and occupying *public lands* in Alaska for the purpose of trade or manufactures" may secure patents to 160 acres, and Section 13 provides the machinery for that purpose. Section 14 then sets forth various exceptions to Sections 12 and 13 including lands occupied by Indians and concludes:

> there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the *lands* granted frequented by salmon [emphasis supplied].

This provision, and other exceptions in Section 14, show that "public lands" in Section 12 were not limited to uplands but included tidelands and lands under water. Again, when Congress, in the Act of July 3, 1926, 44 Stat. 821, 48 U.S.C. 360,

authorized the leasing of "public lands of the United States in the Territory of Alaska" for fur farming, it provided that leases or permits "shall reserve to the Secretary of the Interior the right to permit the use and occupation of parts of said leased areas for the taking, preparing, manufacturing, or storing of fish or fish products."

Similarly, the courts have construed the phrase "public domain" in legislation applicable to Alaska as including submerged lands. In *Alaska Gold Recov. Co.* v. *Northern M. & T. Co.*, 7 Alaska 386, 398, the court referred to submerged lands as part of the "public domain." And more recently in *Dow* v. *Ickes*, 123 F. 2d 909, 914 (App. D. C.), certiorari denied, 315 U. S. 807, the court, referring to the White Act regulatory authority which relates solely to fishing, stated: "The power given is appropriate for the regulation of activities upon the public domain, having as their object the reduction of public property to private use." Cf. 22 Op. A. G. 544.

The administrative understanding that "public lands" in Alaska included submerged lands is shown as early as December 24, 1892, by Proclamation No. 39, 27 Stat. 1052, under Section 24 of the 1891 Act authorizing reservation of "public lands," which set aside Afognak Island and lands within one mile from the shore thereof for fish culture purposes.

The decisions such as *Borax, Ltd.* v. *Los Angeles*,

296 U. S. 10, 17, relied upon by the court below, are not apposite here since they do not deal with public lands in Alaska. The Organic Act of May 17, 1884, 23 Stat. 24, provided that "the general land laws of the United States" should not apply to Alaska, and that "Indians and other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them" (Sec. 8). In addition, the decisions such as that in the *Borax* case all relate to statutes providing for disposal of property of the United States. The 1936 Act did not authorize disposal but merely a reservation of the lands for a particular governmental use, that is, protection and assistance for the Indians. This Court emphasized the importance of that distinction in *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 88, saying:

> The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safeguarding and advancing a dependent Indian people dwelling within the United States.

The distinction between a grant of public lands and a reservation is further illustrated in *Sioux Tribe* v. *United States*, 316 U. S. 317, holding that the President, without express statutory authority, could properly reserve portions of the public

domain for the use of the Indians, but he could not thereby grant vested rights to the Indians so as to give them a right to compensation when the lands were later sold. See also *Ute Indians* v. *United States*, 330 U. S. 169.

The court below thought that the decision in *United States* v. *Holt Bank*, 270 U. S. 49, shows that there is no distinction between the construction to be given a disposal act and a reservation act. But the reservation act involved in the *Holt Bank* case, being a treaty reservation, was more like a disposal than an executive reservation. Unlike the reservation here involved, that created in the *Holt Bank* case gave a compensable interest to the Indians, not merely a temporary revocable right to use and occupy public lands. See *Sioux Tribe* v. *United States*, and *Ute Indians* v. *United States*, *supra*.

Finally, it must be remembered that while ambiguities in grants by the Federal Government are resolved in favor of the United States (*Northern Pacific R. Co.* v. *United States*, 330 U. S. 248, 257), doubtful expressions in Indian treaties and statutes are resolved in favor of the Indians. *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89.

Thus, undoubtedly because of the importance of waters to the Alaskan economy and because the general land laws have not been applied there, Congress, the executive officials and the courts

have used the terms "lands" "public lands" and "public domain" interchangeably in referring to submerged land owned by the Government in Alaska. It was quite natural that the Organic Act of 1884 should refer simply to "lands" since private titles in Alaska had not then been confirmed, but that thereafter Congress should refer to "public lands" so as to exclude tracts where private titles had been obtained. That the word "public" was used for this reason in the 1936 Act and not, as the court below thought, to narrow the scope of lands which might be added to reservations, is borne out by the fact that the proviso following the disputed language refers to all four classes as "such lands." See *supra*, p. 14.

2. *The purpose of Congress to authorize the reservation of tide and submerged lands is evidenced by the circumstances under which the Act of May 1, 1936, was adopted, and by its legislative history.*—The proper approach to the problem of whether an Indian reservation includes coastal waters as well as uplands was outlined by this Court in *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 87, as follows:

> As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reserva-

Act, the Secretary of Commerce should not discriminate among individuals. There is nothing in the Act curtailing the power of other Government officials to set aside federally owned property in Alaska for particular public purposes. It is not to be assumed, for example, absent a specific prohibition, that the proviso deprived the President of his authority to make such reservations of the public domain as the interests of the United States might require (Cf. *United States* v. *Midwest Oil Co.*, 236 U. S. 459), nor that it prohibited inclusion of waters in a military or naval reservation (R. 294) or fishing therein by the Government exclusively for military purposes. Clearly, the Act was not intended to affect the powers and duties of the Secretary of the Interior with respect to Indians.[10]

Moreover, the creation of an Indian reservation is a reservation of lands for governmental use. The full purpose of federal guardianship of Indians is that they receive special protection not granted to other citizens until such time as they may be assimilated into the general population. In view of the history and physical facts of Alaska, a *sine qua non* of such protection is to preserve rights of fishing to the natives. The United States was not named in the Act. Therefore the Act cannot limit the authority of the

[10] The transfer of fishing control from the Secretary of Commerce to the Secretary of the Interior did not diminish those powers (R. 503). It did not enlarge the scope or meaning of the White Act.

United States existing under other statutes to reserve under-water lands for its own uses. *United States* v. *Wyoming*, 331 U. S. 440; *United States* v. *United Mine Workers of America*, 330 U. S. 258.

2. *The legislative history of the White Act affirmatively shows that Indian fisheries are not subject to the antimonopoly provision.*—Prior to 1924, the Secretary of Commerce had asserted the power to establish fishery reservations in which he might grant to selected individuals rights withheld from others. This power, which had been challenged on grounds of law and policy [11] was confirmed in part and curtailed in part in the White Act. It was confirmed insofar as the Secretary was expressly authorized to "reserve fishing areas" for regulatory purposes. It was curtailed in that the Secretary was prohibited from granting fishing privileges to some and denying them to others in the same area. As the Senator in charge of the bill said: "The bill removes the principal cause of complaint with reference to the exercise of power by the Secretary of Commerce * * *." 65 Cong. Rec. pt. 9, pp. 9520-9521 (May 26, 1924); see also 65 Cong. Rec. pt. 10, pp. 9681, 9682; accord: H. Rep. 357, 68th Cong., 1st Sess., p. 2; S. Rep. 449, 68th Cong., 1st Sess., p. 5.

[11] Hearings, H. Committee on Merchant Marine and Fisheries, H.R. 2714, 68th Cong., 1st Sess. (1924), pp. 9-11, 19, 25-28, 83, 272-273.

At the time the Act was passed there were eighty or more Indian settlements in Alaska most of which bordered on tidal waters (R. 502). There had been dispute earlier as to whether such tidal waters could be a proper part of an Indian reservation. That dispute had been finally determined by this Court in *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78. Thus, at various reservations, such as the Tyonek or Moquawkie Reservation, exclusive control over adjacent waters was asserted by the Federal Government on behalf of the natives. See 49 L. D. 592. Certainly the White Act is not to be construed as abolishing these native fishery reserves.[12]

Nowhere does the legislative history show any protest against the Annette Island Reserve, the Tyonek Reserve, or any other native reserve. On the contrary, the whole legislative history of the Act shows that an essential part of the guiding spirit and motive for the legislation was the pro-

---

[12] Respondents assert (Br. in Opp. 14-15, 23) that except for the Annette Island reserve "no Indian or Eskimo reservation in Alaska has accorded any exclusive or special right of commercial fishing". The assertion (Br. in Opp. 15 fn. 4) that the Tyonek reservation involved a "land area only" overlooks the fact that the boundaries ran "to the middle of the main current of the Chuit River, eight miles more or less; thence with the main channel of said stream to where it discharges into Cook Inlet" (Ex. Order No. 2141). In 49 L. D. 592 it was concluded that a lease might be made on this reservation of cannery and fishing privileges so as to increase the income of the natives from fishing. And, the Hydaburg Reservation included "land and water surfaces" of Sukkwan Strait the plat attached thereto showing that considerable water area was involved (Ex. Order No. 1555).

As early as 1795, the Karluk natives are reported to have engaged in commercial fishing transactions with the Russians. Bancroft, H. H., *History of Alaska*, 1730-1885, pp. 230, 357. One of the best statements of the importance of such commercial fishing was made by Alaskan Delegate Sutherland who, quoting an Indian leader, stated (72 Cong. Rec. pt. 2, p. 1202 (1930)):

> There are no people who have a greater right to demand of Congress that its rights be protected than the natives of Alaska. We live on fish and have lived on fish as our principal source of food for centuries. Today we still live on fish; we buy our clothing with fish, support our families with fish, educate our children with fish, and bury our dead from that source.[6]

To these Indians the fishing fields are the harvest fields. As the Commissioner of Indian Affairs stated of the Kodiak Island natives generally in his Report to the Secretary of the Interior in 1875 (p. 203): "* * * but not having either walrus, whales, or large seals, they live more on salmon, whitefish, and other fresh water fish which they catch in ingenious traps, and dry for winter use."

For several years prior to 1936, Congress was repeatedly advised of the importance of fishing

[6] See also 72 Cong. Rec. pt. 3, p. 2408; 75 Cong. Rec. pt. 1, p. 60; Senate Joint Memorial 1, 77 Cong. Rec. pt. 1, pp. 1056-1069; Hearings, H. Committee on Indian Affairs, H.R. 7902, 73d Cong., 2d Sess. pp. 76, 498; and *Moore* v. *United States*, 157 F. 2d 760, 762 (C.C.A. 9), certiorari denied, 330 U. S. 827.

tection of Alaskan natives and other Alaskan residents against the monopoly of Alaskan fishery resources by absentee corporations.

"There is an obligation to the native Alaskan Indian, which conscience demands us to fulfil," said President Harding on July 27, 1923, at Seattle after his return from Alaska, in his last public address, which called for the enactment of legislation along the lines of the White Act. "If Congress cannot agree upon a program of helpful legislation," he declared, "the reservations and their regulations will be further extended by Executive order."[13] In this recognition of the obligation to respect native fishing rights, President Harding was following the words of the Annual Report of the Governor of Alaska in 1922:[14]

> The problems of the fisheries are general, not local, except in respect of the guaranteed rights of the natives which must be respected and upheld.

In this same connection, Secretary of Commerce Hoover expressed his concern over the fact that commercial fishing in some areas was so exhaustive as to bring about "actual starvation among Indians and work dogs."[15]

The hearings before the House Committee on

---

[13] Alaskan Territorial Fish Commission, *Conservation of the Fisheries of Alaska*, August 1923.

[14] *Ibid.*

[15] *Ibid.*

to the Alaskan Indians. In 1930, Alaska Delegate Sutherland stated (72 Cong. Rec., pt. 2, pp. 1200, 1201:

> The poverty, distress, and destitution of the Alaska natives can be attributed only to the selfishness and greed of our absentee landlords and the spinelessness and duplicity of our Department of Commerce. * * * People who do not know Alaska and its native races cannot comprehend what the salmon fisheries mean to its people. The salmon fishery is their last stand in the industries to which they are naturally adapted.

He specifically called the attention of Congress to the great need for protecting the rights of the Karluk Indians in the fishing grounds of their forefathers. Complaining of the inequities of the then existing regulations, he stated that at Karluk, where commercial operators were taking two and a half million pounds of fish "at one heave of the seine," the Indians were hardly permitted to fish. 72 Cong. Rec. pt. 3, p. 2408 (1930).

Memorials from the Territorial Legislature were presented to Congress to show how important the fisheries were to the natives of Alaska and the difficulties they were facing in pursuing their usual occupations. One such memorial, presented by Delegate Wickersham on December 8, 1931, stated:[7]

---

[7] 75 Cong. Rec. pt. 1, p. 60 (1931); see also Senate Joint Memorial 1, 77 Cong. Rec. pt. 1, p. 1069 (1933).

> * * * the white man took the best of their fishing grounds and trapping rights, until, with but a few exceptions, the 30,000 Indians of the Territory of Alaska find difficulty in providing themselves with the necessities of life, with the result that, and because of their peaceable dispositions and lives, the United States Government has taken but little interest in the aboriginal population of Alaska, has not provided adequate reservations for their use * * *.

Delegate Dimond stated on March 30, 1933, the sixty-sixth anniversary of the inclusion of Alaska as a part of the United States:[8]

> If the Indian is to make a living, it must be in the fishing industry. The majority of them earn their bread and butter in this industry. There is no other possible avenue open to them.

The importance of fishing to the Alaska Indians and their need for protection was again emphasized when the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, was being considered by Congress. The delegate from Alaska, Mr. Dimond, testifying before the Indian Affairs Committee, in response to a question whether the land purchase provisions of the bill should apply to Alaska Indians, declared:

> In a few rare cases it would. Of course, the agricultural lands occupied by the Indians, occupied by the Alaska Indians, are very small.

---

[8] 77 Cong. Rec. pt. 1, p. 1056.

> They particularly prefer land along the coast with fishing rights.

Hearings, H. Committee on Indian Affairs, H. R. 7902, 73d Cong., 2d Sess. (1934), p. 76; see *id.*, p. 498.

Most of the provisions of the Wheeler-Howard Act were not made applicable to Alaska at the time, in part because the natives were not sure how it would affect them. Cohen, *Handbook of Indian Law*, p. 415. However, in the 1936 Act the land purchase sections and other provisions relating to lands were extended to Alaska. The Secretary of the Interior, in urging passage of the bill which became the 1936 Act, discussed the utility of precise reservation boundaries for purposes of local government, and stated (H. Rep. No. 2244, 74th Cong., 2d Sess., pp. 3-5; S. Rep. No. 1748, 74th Cong., 2d Sess. pp. 3-4):

> An even more important reason for the designation of reservations in Alaska is that by doing so the United States Government will have fulfilled in part its moral and legal obligations *in the protection of the economic rights of the Alaska natives.* In at least two acts of Congress this obligation is specifically acknowledged. The act approved on May 17, 1884 (23 Stat. 26), contains the following language: "*Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the

terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

The act of March 3, 1891 (26 Stat. 1100), contains similar language * * *. Lands which should have been, by virtue of these acts, segregated for natives of Alaska have not been so segregated. The provisions of section 2 of H. R. 9866 will aid the Federal Government in rectifying this condition, and in protecting the interests of the natives in the future. Section 2 of the bill which gives to the Secretary of the Interior power to designate certain lands as Indian reservations is, therefore, a logical sequence of the legislative history regarding Indian lands in Alaska and provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to those Indians and Eskimos of Alaska who occupy established villages.

The bill provides that reservations shall be set up by the Secretary of the Interior only upon approval of the majority of the residents of such proposed reservation who vote at a special election. This stipulation is in line with the policy of permitting Indians to participate in deciding matters of importance to them. [Emphasis supplied.]

It is clear from the foregoing history that Congress fully understood that the fisheries along the coast and not land cultivation or other enterprise was the basis of the economic life of the Alaskan Indians. It is also clear that in the

1936 Act, Congress was legislating to protect the "economic rights of the Alaska natives" and to fulfill the promises of the 1884 and 1891 Acts. It must be presumed, also, that Congress knew that those earlier enactments had been construed to embrace submerged coastal lands. See *supra*, p. 16.

A reservation limited to barren uplands in Alaska would be of very little benefit to these natives. Nor is there basis for the suggestion of the court below (R. 511), that use of the uplands for launching boats and for posts to which to attach nets would constitute adequate protection of the economic rights of the Indians. The Indians on the Annette Island Reservation could have launched boats from, and attached posts to, their uplands. There, as here, "Salmon and other fish in large numbers frequent and pass through the waters adjacent to the shore", *Alaska-Pacific Fisheries* v. *United States*, 248 U. S. 78, 88. But this Court held that the uplands did not meet "the situation and needs of the Indians and the object to be attained" (p. 87).

The respondents refer to the 1936 Act as a "seemingly innocuous and undiscussed minor amendment to the Wheeler-Howard Act", not to be construed as giving "the Secretary of the Interior a power of life and death over the Alaska salmon industry" (Br. in Opp., p. 21). Limited, as is the 1936 Act, to areas previously reserved for,

warrant a stretching of the proviso in the White Act so as to make of it an implied repealer of existing and future native fishery reserves established under independent statutory authority.

3. *Administrative interpretation of the White Act from 1924 to date has excluded Indian fisheries from the antimonopoly provision.*—The conclusion that the White Act was not intended to wipe out native reserves is fortified by the administrative interpretation of the Act. On June 7, 1924, the day after approval of the White Act, the President "revoked the Executive Orders of February 17, 1922, and November 3, 1922, creating the Alaska Peninsula Fisheries Reservation and the Southwestern Alaska Fisheries Reservation, respectively." These were the two large commercial fishery reservations against which all the attacks in the hearings and debates on the White Act had been directed. But the President and the Secretary of Commerce did not revoke any native reserves. On the contrary, the regulations particularly called attention to the continued existence and validity of these native reserves, mentioning expressly those re-

---

Senator Waligren proposed an amendment to this provision which would substitute the language of the White Act "equality proviso," *Ibid.* p. 13. Delegate Dimond of Alaska likewise objected "as strongly as I can" to the original provision quoted above, *Ibid.* p. 32. The Department of the Interior joined with the Delegate from Alaska in objecting to the measure which, though favorably reported, was never passed by either House. The action of Congress was therefore in accord with the position of the Delegate from Alaska and the Department of the Interior.

or occupied by, the Indians, and lands adjacent thereto,[9] the power granted is hardly one which would permit of the destruction of the entire salmon industry. It is, rather, a power designed to prevent continued disregard of the rights of Indians, granted by a Congress, not in passing and without deliberation, but in response to the representations of such interested parties as "the largest organized body of Indians in Alaska, known as the Alaska Native Brotherhood, and embracing over 5,000 of the native citizens of Alaska", who, the House Committee noted in its report, "at their own expense sent their secretary, Mr. William L. Paul, an attorney at law and a member of the Tlingit Tribe to Washington to appear before the committee in support of the bill and the proposed amendments hereinabove set out," H. Rep. No. 2244, 74th Cong., 2d Sess., p. 3.

The court below seems to have been greatly influenced by the size of respondents, the amount of their investment and the number of employees as compared with the number of Karluk Indians, their resources, etc. (R. 503, 505-506, 511). But Congress in the 1936 Act established the policy of protecting the Indians' fishing grounds from usurpation by the salmon industry. Thus, those policy considerations were not properly a matter

[9] The Solicitor of the Interior Department, in his opinion construing the 1936 Act, ruled that waters not connected with any reservation of uplands could not be reserved for Indians. 56 I.D. 110.

for consideration by the court below. Moreover, the opinion below indicates a misapprehension as to many of the material facts in this regard. For example, reference is made to exclusion of the packing companies "from their established fishing grounds" (R. 512). But it was the Indian who had fished at Karluk from time immemorial. Respondents were newcomers to that area. While, as the findings state, respondents have had canneries on Kodiak Island for from 7 to 24 years (R. 27-28), they have fished the Karluk area only since about 1938, purse seining having been forbidden for many years prior thereto (R. 352-355, 361-363). Thus, while the Kodiak Fisheries Company had operated on the island for 34 years, its fishermen first operated in the Karluk area in 1938 (R. 142; see also R. 159, 285, 172, 216, 291). And the Parks Canning Company started in the Karluk area in 1940 (R. 207). Again, the court below stated that there was no evidence that the catch of the white fishermen in any way lessened the catch of the Indians (R. 505), a passage which respondents quote (Br. in Opp. 23). On the contrary, the natives testified that respondents' operations interfered with the native beach seine (R. 352, 360) and that if the boats had kept out of the area the natives could have caught more fish (R. 361). Similarly, the court emphasized the large area of upland included in the reservation (R. 505) but ignored the evidence that "all

the Karluk natives live by fishing only" (R. 348). Thus, the Karluk area presents a typical example of the situation in which the 1936 Act was intended to give the Alaska Indians protection against the intrusion of the large companies upon the historic Indian fishing sites when the catch of those companies in other areas declined (R. 291, 293-294).

3. *The administrative construction of the 1936 Act supports the view that it embraced submerged coastal lands.*—Shortly after the 1936 act became law, the question here presented was submitted to the Solicitor of the Interior Department. On April 19, 1937, an opinion was given which, after referring to the authorities on the subject, concluded that submerged coastal lands could be reserved for use of the Indians. The Solicitor said (56 I.D. 110, 113):

> The act recites the title of the Indian Reorganization Act (48 Stat. 984), June 18, 1934, which states as its purposes "to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians * * *." It is well known, as is recited in the opinions of the Supreme Court and the Circuit Court of Appeals concerning the Metlakahtla Indians, that the natives of Alaska are not naturally agricultural and depend chiefly on fishing and hunting for their livelihood. The fish of the Alaska coast region is one of their major resources and therefore ap-

propriate to be conserved under the Reorganization Act in connection with their reservations. Moreover, a large number of the organizations developed under the Reorganization Act, particularly in southeast Alaska, will be fisheries and fish canneries. It will be these fish enterprises, similar to the successful enterprise developed by the Indians of the Annette Islands, which will be major users of the credit system established under the Reorganization Act. The Alaska Reorganization Act provides that the Indians may be organized, not as bands or tribes, but as groups having "a common bond of occupation." One of the most usual bonds of occupation is that of fishing and it is certain that many of the communities organized under the Reorganization Act will be fishing communities. The economic purpose of this legislation extending the Reorganization Act to Alaska was made clear in the report by the Interior Department to Congress on this act when it was introduced. The report stated that since the original Indian Reorganization Act did not extend the right of incorporation and enjoyment of credit privileges to Alaska, the Alaska Act was designed to remedy this omission. From these facts it is evident that the purpose of the Alaska Act would be seriously frustrated if the reservations designated under it could not embrace the major resource of many of the Indian organizations.

his administrative interpretation has been fol-

lowed consistently not only in later opinions (57 I.D. 461), but also by the action of the administrative officers establishing other reservations, as well as that for the Village of Karluk. Order of May 20, 1943, 8 F.R. 7731 (Akutan); Order of June 19, 1943, 8 F.R. 9464 (Wales); Order of April 22, 1946, 11 F.R. 6143 (Little Diomede). Thus, for a period of 10 years since the passage of the 1936 Act, the administrative officials have uniformly construed the statute to authorize the reservation of under-water lands and the instant case represents the first time that such interpretation has been challenged. The rule is settled that the construction given to a statute by the authorities charged with its administration is entitled to great weight. This is especially true when statutes relating to public lands of the United States are involved. *McLaren* v. *Fleischer*, 256 U. S. 477, 481; cf. *United States* v. *Wyoming*, 331 U. S. 440. And this Court applied the rule in the similar case of *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 90.

B. The White Act of June 6, 1924, does not prohibit the Secretary of the Interior from including coastal waters in an Indian reservation created under the Act of May 1, 1936.

The Act of June 6, 1924, 43 Stat. 464, as amended June 18, 1926, 44 Stat. 752, 48 U.S.C. 221-228, commonly referred to as the White Act, provides that, for purposes of conservation, "the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska

over which the United States has jurisdiction, and within such areas may establish closed seasons, during which fishing may be limited or prohibited as he may prescribe." In addition, the Act contains the following proviso:

> *Provided,* That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.

The district court held and the circuit court of appeals seems to have concurred in the view that this "anti-monopoly" provision of the 1924 White Act prohibits the Secretary of the Interior from including fishing waters in an Indian reservation established under the 1936 Act (R. 54-59, 502-506). Petitioner submits that the courts below erred in that respect.

1. *The White Act proviso did not purport to limit the authority to set aside public property for federal uses.*—It was the view of the courts below that the White Act limited any action taken with respect to lands under water in Alaska. But the Act does not so provide. It simply directed that in making the fishing regulations authorized by the

of such sites. Neither conclusion follows from the premise. As has been said, the first would merely make appellant a beneficiary of the allegedly illegal system. That the second might provide a method which, if adopted by the Secretary, would avoid the alleged violation of the statutory limitation, does not establish the appellant's right to require him to adopt it or have the courts order him to do so. To do that it would be necessary to show not only that this method would avoid the allegedly illegal discrimination, but that it is the only one which would do so. Appellant has not shown this. The Secretary might prefer some other method or to close Alaskan waters entirely to fishing for salmon by trap. It follows that the affirmative relief which appellant seeks, whether by way of an order directing the approval of specific sites or one directing the opening of new general areas to fishing for salmon by trap, cannot be granted.

In the present case there are many ways whereby the Secretary could avoid the alleged illegality without giving the respondents the right to fish in these waters. He could continue the prohibition in force within the disputed area and drop the exemption. He could, as he has done in the past, forbid all fishing by purse seine boats in the area,[23] which

[23] Purse seining for salmon off the Karluk beach was prohibited from 1924 to 1934. See Department of Commerce, *Laws and Regulations for Protection of Fisheries of Alaska*, Department Circular No. 251, 10th ed. (June 21, 1924), p. 7; 12th ed. (December 5, 1925), p. 12; 13th ed. (December 22,

would eliminate all the operations of the respondents, and permit continued operation of the beach seines used by the natives. Or he could stop all seining operations and allow the installation of traps only by the native landowners. The respondents have not shown and cannot show not only that the relief they seek "would avoid the allegedly illegal discrimination, but that it is the only one which would do so." The action which must appropriately follow upon a declaration of invalidity of Regulation 208.23(r) is action of the Secretary. That being so, he should have been made a party to this suit.

Finally, the only defendant in this case is Frank Hynes, Regional Director of the Fish and Wildlife Service of the Department of the Interior. As respondents' counsel recognized (R. 120), Hynes has no connection with, or duties in regard to, Indian affairs. Plainly, the presence of Hynes as a defendant could not give the courts below jurisdiction to pass on the validity of the Secretary's creation of the Indian reservation.

(1926), p. 13; 16th ed. (December 19, 1929), p. 14; 17th ed. (December 18, 1930), p. 15; 18th ed. (December 17, 1931), p. 16; 19th ed. (December 20, 1932), p. 18; 20th ed. (December 21, 1933), p. 17; the prohibition was lifted by supplementary circular No. 251-20-3 (June 4, 1934). The waters were again closed to purse seining by amendment to sec. 208.18 of the Alaska Commercial Fisheries Regulations of August 27, 1946 (11 F. R. 9528), which was rescinded on January 20, 1947 (12 F. R. 536).

Merchant Marine and Fisheries (Hearings, H. Committee on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st Sess. (1924)) which led to the enactment of the White Act shows that the protests against fishery reservations were directed against the two reservations covering 40 percent of the fishing waters of Alaska (not to Indian reservations like Annette Island, Hydaburg and Tyonek) set up by the Secretary of Commerce in 1922 under which certain companies were allowed fishing rights that were denied to others. The natives themselves were among the foremost sponsors of the White Act, as indicated by communications from the Alaska Native Brotherhood, and from the native communities of Kake, Hoonah, Juneau, and Yakutat. All other witnesses who referred to the natives expressed sympathy and concern for their plight. The charge that the Department of Commerce unjustly denied natives fishing rights was stressed by the Delegate from Alaska. The Solicitor of the Department of Commerce and the attorney for the packers agreed as to the validity of the Annette Island Reservation and made no criticism of it; they cited the decisions of this Court as giving a final and complete clarification of the law. Andrew Furuseth, witness for the International Seaman's Union, declared: "We are destroying the food supply of the Indians and their

villages are decreasing while their graveyards are getting larger in size."

The equality proviso which was designed to stop the process whereby the Secretary of Commerce had granted special privileges to favored companies is originally found in H. R. 4826, 68th Cong., 1st sess. (1924) introduced by the Delegate from Alaska. In its original form this proviso read as follows:

> *Provided,* That no exclusive or several right of fishery shall be granted, permitted, or recognized in the Territorial waters of Alaska by the Secretary of Commerce, the Alaska Territorial Legislature, the Alaska Fish Commission, or any other constituted authority except the United States Congress: *Provided further,* That this provision shall not affect any right exercised by the descendants of the aboriginal people of Alaska or those of the half blood who are descendants of the aborigines which were exercised and claimed up to the passage of this act.

As originally formulated, the first of those provisos, applying in terms not only to the Secretary of Commerce but also to "any other constituted authority except the United States Congress" (including, of course, the Secretary of the Interior), might well have been construed as an extinguishment or prohibition of native fishing rights; therefore the second proviso was added to eliminate the possibility of any such construction.

When later the first proviso was reduced to a limitation upon the permissive powers of the Secretary of Commerce alone, the second proviso was no longer necessary and was dropped. The reports of the House and Senate Committees credited the delegate from Alaska as the author of the proviso prohibiting the Secretary of Commerce from granting special privileges. They explained the proviso and its purpose in the following terms:[16]

> The section further deals directly with a practice heretofore followed with respect to granting fish permits. At the present time it is the policy of the department as one means of control of fishing to grant a limited number of fishing permits within any designated area and to exclude all others from fishing rights therein. Your committee does not question the purpose of the department in this regard, but it has reached the unanimous and positive opinion that this practice of granting exclusive fishing privileges should cease and in this section it is declared that all regulations authorized to be made shall be of general application and that no exclusive or several right of fisheries shall be granted, nor shall any citizen be denied the right to take fish in water where fishing is permitted. This declaration of policy and prohibition of law was earnestly urged upon the committee by the Delegate

[16] S. Rep. 449, 68th Cong., 1st Sess., p. 5; citing H. Rep. 357, 68th Cong., 1st Sess., p. 2. It is clear that Delegate Sutherland was agreeable to the amended language. See 65 Cong. Rec., pt. 9, p. 9520 (1924).

> from the Territory, Mr. Sutherland, and has the general support of the people of the Territory.

It would be ironic in the extreme if the "equality" proviso which the Alaskan natives urged in 1924 and which Delegate Sutherland persuaded Congress to include in the White Act should be used, after twenty years, not to wipe out exclusive rights in fish trap sites, which Delegate Sutherland denounced, but rather to wipe out the last toehold that Alaskan native communities have on the few fisheries that remain to them.

The legislative debates indicate clear recognition of the need for protecting the economic position of the Alaskan native,[17] and at least one proposed amendment was rejected on the ground of probable injury to Indians.[18] There is nothing to

---

[17] See e.g. 65 Cong. Rec. pt. 10, p. 9688 (1924).

[18] 65 Cong. Rec. pt. 6, pp. 5973-5975 (1924). Subsequently, in 1944, the subject was mentioned in connection with a bill that was never passed. In the court below, respondents relied upon the report of the Senate Commerce Committee which rejected a request of the Department of the Interior to add to the equality provision the language "subject to the provisions of * * * the Act of May 1, 1936 (49 Stat. 1250, c. 254) and other applicable laws" (S. Rep. No. 733, 78th Cong., 2d Sess., p. 6). The Committee Report was not based on the view that the Indians had no right of fisheries but the amendment was rejected because that Committee did not deem it appropriate "to deal with Indian questions in the present bill which relates to the conservation of the Alaskan fisheries" (S. Rep. No. 733, 78th Cong., 2d Sess., p. 6). As originally introduced, the bill provided that the fisheries of Alaska "shall be open to all citizens of the United States free of all exclusive or several rights under any claim of occupancy, aboriginal or otherwise." Hearings on S. 930, Sen. Com. on Commerce, 78th Cong., 2d sess. (1944) p. 1.

serves (Annette Island, Aleutian Islands, Afognak and Yes Bay) that in terms reserved fishing areas for native use.[19] From the very outset, the regulations promulgated by the Secretary of Commerce made specific reference to the fact that within such reservations as the Annette Island Reserve fishing could be carried on only subject to the regulations governing native reservations prescribed by the Department of the Interior.[20]

---

[19] Department of Commerce, *Laws and Regulations for Protection of Fisheries of Alaska* (Dept. Circular No. 251, 10th ed.) June 21, 1924, pp. 5-6.

[20] The first Alaska fishing regulations following approval of the White Act on June 6, 1924, dated June 21, 1924, set apart as fishery reserves practically all of the waters of Alaska south of Bristol Bay, thus including four reservations in which Indians had special rights, the Annette Island Reservation, the Aleutian Island Reservation, set up by Executive Order of March 3, 1913, the Afognak Reservation and the Yes Bay Reservation. The last-named of these consisted of land and water "set apart as a site for a salmon hatchery, subject to the possessory rights of the natives and of persons claiming title through the Russian Government, also subject to the rights of natives to take fish from the waters and fuel from the forests included in the limits of the reservation." As to the Afognak Reservation, the White Act regulations were expressly declared inapplicable. The remaining three came within the areas reserved under the White Act. The attention of all fishermen was called to the prohibitions against non-native fishing in all four of these areas.

The regulations issued on December 5, 1925 (Department Circular No. 251, 12th ed.), followed the same pattern, as did the regulations dated December 22, 1926 (Department Circular No. 251, 13th ed.); and, except for the omission of references to the Afognak Reservation, similar provisions are found in the regulations promulgated on December 19, 1929 (Department Circular No. 251, 16th ed.). In later years, references to the "Yes Bay Reservation" were dropped, but express reference to the Annette Island and Aleutian Reservations has continued year by year down to and in-

The Department of the Interior concurred in this view and continued, from time to time, after 1924, to establish reservations of land and water for the use of native Alaskan fishing villages. One of the last public acts of President Hoover, who, as Secretary of Commerce, had been largely responsible for the formulation, enactment, and approval of the White Act,[21] was to establish a native fishery reserve at Amaknak Island (Executive Order No. 6044, dated February 23, 1933). This order carries the title: "Withdrawal of Lands to Protect Fishing Rights of Alaska Natives" and the description of the lands withdrawn, one boundary of which ran "across Iliuliuk Bay", shows that under water lands were included. It could hardly be thought that President Hoover, in issuing this executive order, was going counter to the purpose of the White Act.

This was the situation when the Department of the Interior entered upon a program of establishing reserves under the Act of May 1, 1936, 49 Stat. 1250, at the request of various native communities, which included ocean waters expressly or by impli-

---

cluding the current regulations. (See 1948 Regulations, pp. 13, 59.)

Since 1942, the regulations issued under the White Act have further expressly prohibited the establishment of fish traps in Indian reservation waters unless the Indians concerned agree thereto (Regulation 201.21b).

[21] See S. Rep. 449, 68th Cong., 1st sess., pp. 2-4; 65 Cong. Rec. pt. 10, p. 9701 (1924); Hearings, H. Committee on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st sess. (1924), p. 1.

cation, wherever such waters were necessary for the local economy. At the outset, this practice was carefully considered and upheld in a Solicitor's opinion on April 19, 1937 (56 I.D. 110), and thereafter, as we have shown *supra*, p. 36, many reservations were established on the basis of that view of the statute.

4. ***The White Act of 1924 is superseded by the 1936 Act to the extent of any inconsistency.***— Respondents attempt to construe the White Act "equality" proviso as if it had said "no exclusive right of fishing may be reserved to any Indian under any statute enacted or to be enacted." As we have shown, such construction is not permissible in view of the language of the Act, its legislative history and its administrative construction. In addition, we have shown that the 1936 Act plainly authorized the inclusion of underwater lands in an Indian Reservation so as to reserve for the Indian an exclusive right of fishery. Thus, acceptance of respondents' construction of the White Act would produce an inconsistency between the two statutes.

But, even if such a view were accepted, the earlier act is superseded by the later act to the extent of any inconsistency. This means that the parts of the White Act providing for restrictions and prohibitions relating to gear, season, and take, as well as the enforcement provisions of the act, continue in force. The only part of the White Act that would fall, if the argument of incompatibility is accepted,

is the "equality" provision. This would substantiate the validity of the 1936 Act, the Karluk Reservation, and the use of other provisions of the White Act, unrestrained by the "equality" provision, to regulate fishing on the Karluk Native Reserve and to enforce regulations.

We submit, therefore, that the decisions of the courts below to the effect that the White Act prohibits inclusion in the Karluk Reservation of underwater lands is founded on the proposition that the Alaskan Indians are in the same position as other citizens. Since this proposition is contrary to the fact—recognized by Congress at the time of the passage of both the White Act and the 1936 Act—that the Indians have special interests in their historic fishing grounds and that protection of such interests is a proper function of the Federal Government, the holdings of the courts below were clearly erroneous.

II

THE SECRETARY OF THE INTERIOR WAS AN INDISPENSABLE PARTY TO THIS SUIT

We have shown in Point I that the Secretary of the Interior was clearly authorized by Congress to set aside the disputed area as an Indian reservation. The decision below was, we submit, erroneous for the additional reason that the issues raised were not properly before the Court.

Pursuant to the authority contained in the White

Act, the Secretary of the Interior on March 22, 1946, amended the Alaska Fisheries Regulations by adding a regulation which closed to fishing for salmon "all waters within 3,000 feet of the shores of Karluk Reservation" except "to fishing by natives in possession of said reservation [and] to fishing by other persons under authority granted by said natives." Section 208.23(r), 11 F. R. 3103.[22] The result of the action was to make applicable the provision of the White Act punishing unlawful fishing by imposition of criminal penalties and by seizure of fish taken and of the boat, gear, and equipment used in such unlawful fishing. The trial court permanently enjoined enforcement of these provisions in the Karluk Reservation (R. 40-42). The circuit court of appeals upheld the injunction (R. 512). In so doing, the court below held, however, that the Secretary of the Interior was not an indispensable party to this suit because he "was without any authority whatsoever" to reserve coastal waters for the Indians under the 1936 Act and to regulate fisheries under the White Act by excluding some fishermen but not all (R. 512-513). As basis for that ruling the court relied on *Neher* v. *Harwood*, 128 F. 2d 846 (C. C. A. 9); *Colorado* v. *Toll*, 268 U. S. 228, and similar cases (R. 513-514). Subsequently, this Court in *Wil-*

[22] This regulation was amended on August 27, 1946, 11 F. R. 9528, by adding, "Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative."

liams v. *Fanning*, 332 U. S. 490, held that the Postmaster General was not a necessary party to an action to enjoin enforcement of a fraud order. But the rule with respect to the necessity of joining the superior officer announced in those cases may not be so simply applied here.

The waters involved are the property of the Federal Government. There can be no question that the Secretary of the Interior was authorized to issue regulations relating to fishing in the disputed area. See *infra*, pp. 54, 58. Thus, this is not a case like *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, where if the claim asserted by the plaintiff is correct the public official will be invading private rights and will have no authority in the premises. Here, the Secretary is vested with a broad discretion in dealing with this public property. Hence, while in form the judgment simply enjoins enforcement of the regulation, it does in fact, "expend itself on the public treasury or domain or interfere with the public administration." *Williams* v. *Fanning*, 332 U. S. 490, 493. This is clear from the fact that affirmance of the judgment below would necessarily require the Secretary to take some further action to reconcile the interests of conservation, the Indians and the salmon fishers.

The situation is similar to that presented in *Dow* v. *Ickes*, 123 F. 2d 909, certiorari denied, 315 U. S. 807, in which the plaintiff asserted that the regulation there in question was void because it created

a monopoly. Dow claimed that three large corporations owned or controlled all the fish traps lying in the area excepted from the blanket provision against traps. He sought to have the Secretary either grant him a trap site in the excepted area or open a general area for traps.

The respondents here do not seek to compel the Karluk natives to stop fishing just as Dow did not seek to stop others from using trap sites. The respondents, like Dow, seek to fish in the restricted area themselves. Assuming that the second sentence of Regulation 208.23(r), granting an exclusive right of fishery to the Karluks, is not authorized by the White Act, the respondents seek (1) either to have the court by injunction extend to them the same illegal privilege they say the Secretary gave to the Karluk Village, or (2) to have the court by injunction declare open for fishing the area which the Secretary has closed to fishing. This they may not do. As the court said in the *Dow* case, at page 915:

> The fundamental fallacy of appellant's argument, so far as it seeks the opening of new sites or additional general areas for fishing, is in the assumption that because the Secretary may have acted illegally in the method by which he has allocated trap sites, that confers upon appellant either the right to require him to do so also as to the sites for which he has applied or the right to have additional areas opened for the "voluntary" location and use

III

THE DISTRICT COURT ERRED IN ENJOINING ENFORCEMENT OF ALASKA FISHERIES REGULATION 208.23(r).

A. Respondents, as trespassers, are not entitled to an injunction against enforcement of Regulation 208.23(r).

Any fishing in the disputed area without the consent of the Indians would constitute a trespass upon the reservation. Being trespassers, respondents cannot "show that the act of the Secretary amounts to an interference with some legal right of theirs" which they must do to support an injunction. *Stark* v. *Wickard*, 321 U. S. 288,290.

Even if it be assumed that the remedies of the White Act might not properly be invoked in that area, respondents may not enjoin the invocation of such penalties as a punishment for their trespasses. A court of equity will not thus aid a willful wrongdoer. It is not the function of the courts to advise wrongdoers as to what penalties may lawfully be imposed upon them in advance of their intended further trespasses. *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331; *Beck* v. *Flournoy Livestock & Real Est. Co.*, 65 Fed. 30 (C. C. A. 8), appeal dismissed, 163 U. S. 686; *Carolene Products Co.* v. *Evaporated Milk Ass'n*, 93 F. 2d 202 (C. C. A. 7).

B. The remedies of the White Act may properly be invoked in this area.

While the disputed area was set aside for the primary use of the Karluk Indians as an Indian

Reservation in 1943, the Indians sought to exclude outside fishermen only from a small area at the mouth of the Karluk River where they did their beach seining (R. 351-352). Various commercial fishermen continued operations in this small restricted area despite notice of the existence of the reservation. Remedies then available were inadequate to accomplish the purpose of protecting Indian fishermen from interference. Although an injunction could be secured, as it was in the case of *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, that remedy would be of little practical help in this instance because the unauthorized fishing in this area is by purse seines rather than by large permanent traps, the season is short, the number of fishermen numerous, and the courts remote. There is no penal statute enforceable against trespassers on Indian reservations in Alaska. In this situation, the applicability of the penal provisions of the White Act is essential to protection of the rights of the Karluk Indians in this area.[24]

1. *The White Act may properly be applied to an Indian reservation.*—Apart from the "equality" provision of the White Act, no reason is suggested why that Act may not be applied to an area within

---

[24] These provisions were inserted in the White Act because, as the House Committee which drafted that Act declared, "There is much evidence that men may profitably fish in violation of law, the penalties being of little consequence in comparison with the value of the fish taken." H. Rep. No. 357, 68th Cong., 1st Sess., p. 3.

an Indian reservation. In fact, the practice has been to include Indian reserve waters within White Act Fishery reserves and thus make applicable to persons fishing in such areas the law, regulations, and penalties applicable to both types of reservation. See note 20, *supra*, pp. 47-48.

As we have shown *supra*, pp. 36-49, the "equality" provision of the White Act was not intended to apply to the Federal Government or its Indian wards nor did it prevent the establishment of fishery reserves for use of the Indians. Hence, the provisions of the second paragraph of regulation 208.23(r) did not, as the courts below held, violate the White Act.

The rulings of the courts below are based on the premise that the "equality proviso" requires absolute equality and that discrimination between individuals is prohibited, whatever be the reason therefor. Plainly, this is not the meaning of the White Act. For example, the Secretary can limit the number of fish traps, *Dow* v. *Ickes*, 123 F. 2d 909, 916 (App. D. C.) and the regulations establish a minimum distance between traps or fixed gill nets, 50 C.F.R. secs. 204.9, 205.10, 207.15, 208.8, 209.11, 211.12. The result of these regulations is to discriminate in favor of the person who first establishes the trap or net. As the court said in *Dow* v. *Ickes*, 123 F. 2d at p. 916:

> But the statute does not guarantee equality in an absolute sense. It prohibits monopoly,

> but it does not prohibit reasonable discriminations required by the purpose of conservation and limitations inherent in the type of fishing to which the Secretary's judgment must be applied.

Similarly the regulations discriminate in favor of "native Indians and bona fide permanent white residents" as to the type of gear used for the capture of king salmon. 50 C.F.R. secs. 203.3, 203.6. They discriminate against the owners of motor-propelled fishing boats and in favor of the owners of rowboats and sailboats, 50 C.F.R. secs. 203.11, 204.16. They discriminate in the Karluk area in favor of beach seiners and purse seiners as against trollers and owners of other types of gear, 50 C.F.R. secs. 208.18, 208.19. All of these discriminations are, we submit, plainly valid as a reasonable exercise of the Secretary's discretion. Cf. *Wampler* v. *Lecompte*, 282 U. S. 172. Yet the result of any such regulation is, of course, to deprive some citizens of absolute equality.

The Karluk Indians, as we have shown, have a special interest in the area in question because it has been set aside for their exclusive use under the 1936 Act. This fact constitutes reasonable basis for making a distinction between the Karluks and others when applying the White Act to that area. The fact that enforcement of White Act regulations results in benefiting those persons who have been favored by one of the discriminations

mentioned above, does not render such enforcement unlawful. So here the fact that the Karluk Indians are specially benefited because of the reservation established for them does not render application of White Act remedies unlawful. Certainly, it cannot be said that if someone violated the regulations as to minimum distances between fish traps, the White Act remedies could not be applied against him because the owner of the legal trap enjoyed a favored position. To take such a view would render the Government powerless to deal with disorder and violence in the fisheries of the Alaskan coast.

2. *The regulation was made for the purposes of conservation.*—The district court expressed the opinion that because the regulation did not limit the number of fish that might be caught, it was not in aid of conservation (R. 59). And respondents say (Br. in Opp. 10) "By no stretch of the imagination can this [the regulation] be deemed conservation." The White Act provides that action may be taken "for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska." However, the Act did not provide for judicial review of the Secretary's determination that a particular regulation would serve such a purpose. As the court said of the Act on that issue in *Dow* v. *Ickes*, 123 F. 2d 909, 914 (App. D.C.) certiorari denied, 315 U. S. 807, "Broader discretion could hardly have been con-

ferred" and the courts "have no power to direct him [the Secretary] as to the manner in which his discretion shall be exercised."

The only basis, therefore, for overriding the Secretary's determination that the regulation aids conservation would be a finding that it was arbitrary or capricious. But that cannot be done on the record in this case because respondents made no attempt to show the facts considered by the Secretary in making his determination or that they could not constitute a rational basis for his conclusion. *Miss. Valley Barge Co. v. United States*, 292 U. S. 282, 286; *Edward Hines Trustees v. United States*, 263 U. S. 143, 148; *Louisiana & P. R. Ry. Co. v. United States*, 257 U. S. 114, 116; *United States v. Ohio Oil Co.*, 163 F. 2d 633 (C. C. A. 10); cf. *Securities and Exchange Commission v. Chenery Corp.*, 332 U. S. 194. On the contrary, both respondents and the court below seem clearly to admit that conservation will result from the regulation by contrasting at length the amount of respondents' investment in canneries and fishing equipment with the small number of Karluk Indians. Moreover, the claim that equitable relief should be had because enforcement of the regulation threatens destruction of respondent's fishing business is contradictory to any contention that conservation will not be served.

In any event, there are valid reasons for concluding that the regulation would lead to conserva-

tion of salmon. The courts below assumed that the Secretary of the Interior had simply delegated all responsibility for salmon conservation control to the native villagers. But in fact their fishing and the fishing by their permittees remained subject to Secretarial regulation. (50 C.F.R. 201, 208.) Indeed the village ordinances and the permits issued have always been submitted for the approval of the Secretary of the Interior or his representative (R. 413, 466-480), and the governing regulation has made this explicit since August 27, 1946. See note 2, *supra*, p. 8. Thus there is no danger, and has never been any danger, that a local permit system would fail to carry out the conservation objectives of the Interior Department under the law. The courts below further assumed that from the standpoint of conservation it makes no difference whether fish are caught by resident natives or itinerant white men. But it is evident that a year-round resident of a community which depends for its livelihood on the salmon of a given river is more likely not to catch or permit to be caught the marginal salmon needed for perpetuation of the run than an itinerant outsider. It is in recognition of this fact that every state in the Union and every province in Canada, as well as the Territory of Alaska itself, differentiates in its conservation laws between fishing or hunting by local residents and fishing or hunting by non-residents.[25]

[25] For a summary of fishing laws and regulations, see *Outdoors*, vol. XIV, No. 7, August 1946, pp. 8-9; for a summary

This distinction, which has been repeatedly upheld by the courts,[26] is rooted in the simple fact that a local population normally has a genuine concern for the perpetuation of its fish and game which is not shared by outsiders who can travel hundreds of thousands of miles to one location, wipe out its fish or game, and travel an equal distance in another direction, a year or decade later, to repeat the process.[27] The "get rich and get out" approach has been responsible for ruining many of the salmon streams of Alaska and seriously depleting others. S. Rep. No. 449, 68th Cong., 1st Sess. (1924), p. 5; Hearings, H. Committee on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st Sess. (1924), pp. 4, 16, 172-174. Indeed, the tragic story of the decline of the Karluk fisheries was one

---

of hunting laws and regulations see *ibid.*, No. 9, October 1946, pp. 8-9. Eleven states further distinguish between residents and nonresidents of the county in which fish or game is taken. These states are: Alabama, Florida, Georgia, Kentucky, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Virginia, and Washington.

[26] *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510; *Anderson* v. *Smith*, 71 F. 2d 493 (C.C.A. 9). In *Toomer* v. *Witsell*, 334 U. S. 385, a state statute virtually excluding non-residents from shrimp fisheries was held to be insufficiently justified as a conservation measure to meet the strict requirement of the privileges and immunities clause. Here the standard is less strict in that the Secretary is granted an extremely broad range of discretion in determining what measures should be taken for conservation purposes. In addition, as outlined in the text, the factors justifying Regulation 208.23(r) as a conservation measure are more clear.

[27] "The salmon streams of California, Oregon, and Washington, having been depleted through lack of proper care, the industry has moved progressively northward to Alaska." Commissioner O'Malley in Hearings, H. Com. on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st Sess. (1924), p. 4.

of the major factors leading to the enactment of the White Act, *op. cit.* pp. 4, 271. The Karluk natives, whose reservation includes the lower Karluk River and adjacent uplands (R. 286), have an interest in maintaining the Karluk salmon supply which is as great as their interest in their lives and the lives of their children. The future of the Karluk salmon supply will largely depend upon the extent to which that interest can be asserted.[28]

The necessity of control is evident from the decline of approximately 75 percent in the red salmon catch at Karluk from the first decade of intensive fishing operations by nonresidents (1888-1897) to the decade from 1927 to 1936.[29] Whether the method of control selected by the Secretary is, under all the circumstances, the best one or whether it may need amendment in the future are questions to be

---

[28] The modern trend of conservation is to rely increasingly on the cooperation of local landowners in protecting and restoring the wildlife that is dependent upon their lands and waters. "The fundamental principle which must govern the regulation of hunting is that the average human can be induced to conserve voluntarily what stays on his own land, so that it is available for his own use, but only the exceptional individual will voluntarily conserve what he shares with the community at large. * * *" (Leopold, Aldo, *Game Management*, p. 209.) Cf. testimony of Commissioner O'Malley: "It is not human to expect any canner, however much he realizes that streams are being depleted by over fishing, to limit his own catch, when he knows that his competitor will thankfully accept and put in cans whatever fish he spares for spawning purposes." (Hearings, p. 3, *supra*, Note 21; p. 48.)

[29] *Fluctuations in Abundance of Salmon of the Karluk River, Alaska.* (Fishery Bulletin No. 39, Table I.) A 50 percent decline was reported in 1924. Hearings, H. Com. on Merchant Marine and Fisheries, H. R. 2714, 68th Cong., 1st Sess. (1924), pp. 4, 271.

resolved by the Secretary and not the courts. Certainly, until the contrary appears, it may not be assumed that the Karluk natives will issue so many licenses that the fisheries will continue to be depleted.

The fact that the regulation serves the dual purpose of protecting the Indians and conserving the salmon does not invalidate it. Cf. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 533-534. On the contrary, it is the Secretary's duty to consider all factors which in his judgment help to determine whether a particular action is advisable. Conservation regulations always involve questions of financing, enforcement, safeguarding of property rights,[30] and other distinct but related factors. That is why the power to issue conservation regulations is not a purely technical matter of biology but a matter of judgment with which the courts have traditionally refused to interfere.

One of the factors which must necessarily be considered in administering such a program is the definition of the rights of interested persons and the prevention of trespassing, poaching, etc., so that ordinary activities will not be disrupted by disputes and conflicts. Certainly, it is within the

[30] See *Thomson* v. *Dana*, 52 F. 2d 759, 764 (D. Ore.), where, as in the case at bar, boat fishermen tried to upset a regulation on the ground that it gave undue advantage to owners of the beach, and the court rejected the attack, pointing out that it was perfectly consistent with good conservation practice to recognize the rights of shore owners to "prevent trespass on their own lands."

purpose of the White Act to promote fishing, that the Secretary should have power to prevent boats from interfering with the operation of beach seines as happened here (R. 360-361).

In short, while the courts below purport to recognize the wide discretion given to the Secretary in the White Act, acceptance of their position would seriously impair, if not annul, that grant of discretion. We have shown that the salmon supply at Karluk has been very seriously depleted. However, the Secretary could not completely close the area to fishing since such action would destroy the Karluk Indians. Respondents' position and that of the courts below is that the Secretary must either leave the area open for fishing, contrary to the interests of conservation, or must close it absolutely with the resulting impoverishment of the Indians. Surely Congress did not intend to place the Secretary in such an impossible position. The very purpose of the grant of discretionary powers was to make avoidance of such a dilemma possible.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.
ROGER P. MARQUIS,
S. BILLINGSLEY HILL,
Attorneys.

SEPTEMBER 1948

☆ U. S. GOVERNMENT PRINTING OFFICE 1948 803859 21

No. ~~218~~ 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 194~~7~~ 48

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner*,

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, MCNEILL & LIBBY, FRANK MCCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., AND UGANIK FISHERIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

EDWARD F. MEDLEY,
FRANK L. MECHEM,
W. C. ARNOLD,
Seattle, Washington,
Attorneys for Respondents.

COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Washington, D. C.,
Of Counsel.

March, 1948.